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Honorable Charles E. Schumer
United States Senate
313 Hart Senate Office Building
Washington, DC 20510

Dear Senator Schumer:

This letter replies to an inquiry from your office on a matter of judicial ethics. I have taught legal and judicial ethics at New York University School of Law for 27 years and do most of my research and writing in the field. I have also written in the area of the inquiry. See Stephen Gillers, "*If Elected, I Promise [_____]" – What Should Judicial Candidates Be Allowed to Say*?, 35 Ind. L. Rev. 725 (2002).

I am asked whether it would be appropriate for a nominee for a seat on the United States Supreme Court to respond to questions from the Judiciary Committee concerning his or her views on constitutional issues including views on decisions of the Supreme Court addressing those issues.

I, along with the other law professors on the annexed list, conclude that it would be appropriate for a nominee to answer these questions so long as he or she does not, "with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office"

The quoted standard comes from Canon 5A(3)(d) of the ABA Model Code of Judicial Conduct, which was amended in 2003 to comply with the holding of the Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), discussed below. The quoted standard applies to both appointed and elected candidates. ("Candidate" is defined in the Code's Terminology to include both routes to judicial office.) Also in 2003, and to comply with *White*, the ABA defined "impartial" to denote "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." Here, of course, the focus is on issues, not parties.

We believe that the ABA standard correctly states the limits on what a candidate for appointed judicial office may say at confirmation hearings. Read against the backdrop of *White*, which the standard implements, a nominee could properly answer the questions described above. We further conclude that compliance with the quoted standard will satisfy the requirement of the Code of Conduct for United States Judges promulgated by the Judicial Conference of the United States.

Discussion

Analysis of what candidates for appointed or elected judicial office may say without thereby requiring their disqualification must begin with *White*, which considered the constitutionality of a Minnesota rule restricting judicial campaign speech. A candidate for election to the Minnesota Supreme Court had challenged the state's restriction on his ability to publicly criticize certain decisions of the *very court* for which he was a candidate.

When the case reached the United States Supreme Court, the lower federal courts and the Minnesota Supreme Court had already construed the state's speech restriction quite narrowly. As construed, the Minnesota rule prohibited a candidate's campaign statements only on "disputed issues that are likely to come before the candidate if he is elected judge." Even on those issues, the lower courts said, the candidate could offer "general discussions of case law and judicial philosophy." *Id.* at 771-772. Despite this narrowing of the limitation on the candidate's speech, Justice Scalia's opinion for the Court in *White* said that the Minnesota rule violated the First Amendment. Because the Minnesota rule, as construed by the lower courts, was substantially less restrictive of speech than the then current language in the ABA Model Code, the Court's decision rendered that language unconstitutional as well. The following year the ABA adopted new language, quoted in part above, to satisfy *White*.

The candidate in *White* was seeking election to the very court whose opinions he wanted to criticize. He would if elected be in a position to limit or overrule those opinions. This will also be so for a nominee to the United States Supreme Court who is asked his or her views about its opinions.

Minnesota cited two interests in its rule that, it argued, justified the limitation on candidate speech. These were "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." Id. at 775. Justice Scalia discussed the interest in impartiality from three perspectives, two of which are relevant here. (The third perspective – bias for or against a particular party – is not relevant here.)

Justice Scalia said that impartiality may mean "lack of preconception in favor of or against a particular *legal view*." *Id.* at 777 (emphasis in original). The Court held that this state interest was not sufficient to overcome First Amendment objections. Justice Scalia recognized that judges have legal views on issues all the time and still may sit in cases raising those issues. Quoting Chief Justice Rehnquist's memorandum opinion declining to recuse himself in *Laird v. Tatum*, 409 U.S. 824 (1972) despite congressional testimony that Mr. Rehnquist had given as an Assistant Attorney General, Justice Scalia wrote:

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. *Id.* at 777-778 (internal citation omitted).

Justice Scalia also quoted Justice Rehnquist's observation in *Laird* that "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Id.* at 777.

Next, Justice Scalia said that the state's interest in impartiality "might be described as [an interest] in open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." *Id.* at 778. In response, Justice Scalia pointed out that judges will often have expressed an opinion on a legal issue, yet we nevertheless deem them able to sit in a case raising that issue. Justice Scalia wrote:

> Most frequently, of course, that prior expression [of a legal position] will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches. *Id.* at 779.

Here Justice Scalia cited Canon 4(B) of the ABA Code of Judicial Conduct, which provides: "A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law." (The Code of Conduct for U.S. Judges has a parallel provision in Canon 4(A).) The definition of "law" about which judges may speak and write explicitly includes "decisional law." ABA Code, Terminology. Although the authority to engage in "extra-judicial activities concerning the law [is] subject to the requirements of this Code," that "subject" clause, we are told by the Code's Commentary, "is used notably in connection with the judge's governmental, civic or charitable activities." Canon 4(B), Commentary.

It does not matter to this analysis that the candidate in *White* was running for elective office while the nominee before you will be seeking Senate confirmation. *White* tells us that impartiality is not compromised when a judge or candidate criticizes decisional law. And the ABA Code, amended to satisfy *White*, gives candidates for appointive judicial office the same leeway as candidates for judicial election.

Of course, a candidate for judicial office should not say how he or she would decide particular cases. But speaking specifically, even critically, about decisional law is quite different from a commitment to how the nominee would decide particular cases. In *White*, Justice Stevens, dissenting, wrote that statements of a candidate for judicial office that "seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected...evidence a lack of fitness for the office." *Id.* at 798. Rejecting that conclusion, Justice Scalia wrote for the Court:

> [A]ll statements on real-world legal issues "indicate" how the speaker would rule "in specific cases." And if making such statements (*of honestly held views*) with the hope of enhancing one's chances with the electorate displayed a lack of fitness for office, so would similarly motivated honest statements of judicial candidates made with the hope of enhancing their chances of confirmation by the Senate, or indeed of appointment by the President. Since such statements are made, we think, in every confirmation hearing, Justice Stevens must contemplate a federal bench filled with the unfit. (Emphasis in original.) *Id.* at 781 n.8.

In sum: It is hardly possible that a person could achieve nomination for appointment to the United States Supreme Court and yet have no opinions about the significant constitutional issues and cases of our day. And the fact that the nominee does have such opinions and voices them will

not undermine impartiality or the appearance of impartiality such that he or she would be disqualified when those issues or cases come before the Court. *White* itself rejected Minnesota's interest in the appearance of impartiality in defending its rule.

I hope I have responded adequately to the inquiry of your office. Please feel free to call me if I can be of further assistance.

Sincerely yours,

Stephen Gillers

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